Supreme Court, U.S.
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No. 942101 JUN 20 1995
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CARLOS O. SALINAS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the
Texas Court of Appeals
For the Thirteenth District

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ATTORNEY FOR PETITIONER

June 20, 1995

ISSUE PRESENTED

Because the prosecutors did not come forward with any explanation for the State's peremptory strikes of veniremen Flores and Torres, the State denied equal protection rights guaranteed under the Fourteenth Amendment to the U.S. Constitution. Those fundamental rights were again denied by the trial and appeals courts below, after both courts found the unrebutted facts established a prima facie case of purposeful discrimination. Nevertheless, the Texas Court of Appeals affirmed Petitioner's convictions of guilt.

LIST OF ALL PARTIES BELOW

The original parties before the Texas Court of Appeals for the Thirteenth District were the State of Texas and Petitioner Carlos Ochoa Salinas.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Carlos Ochoa Salinas was represented at trial and on appeal by criminal defense attorney Joseph A. Connors III of McAllen, Texas.

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OPINION BELOW

The opinion of the court of appeals (Pet.App. 1-28) is reported. Salinas v. State, 888 S.W.2d 93 (Tex.App.—Corpus Christi 1994), pet. ref'd, ___S.W.2d ___ (Tex.Cr.App. 1995).

JURISDICTION

The Texas Court of Appeals for the thirteenth judicial district entered its judgments and opinion on October 13, 1994. That Court of Appeals overruled Petitioner's timely filed petitions for rehearing on November 17, 1994. On December 14, 1994, the Petitioner timely mailed for filing his petitions for discretionary review. The Texas Court of Criminal Appeals refused Petitioner's petitions for discretionary review on March 22, 1995. Within the 90 day period following March 22, 1995, Petitioner timely mailed this petition for writ of certiorari for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> Any persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASON FOR GRANTING REVIEW

The Texas Court of Appeals has decided a federal question in a way that conflicts with Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). See Supreme Court Rule 10.1(c).

Petitioner's conviction should be overturned because the State failed to sustain its burden of production, and therefore failed to rebut Petitioner's prima facie case of discrimination in use of the State's peremptory challenges during jury selection. Batson, 476

U.S. at 100, 106 S.Ct. at 1725. There the Court said:

> If the trial court decides the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E.g., Whitus v. Georgia, 385 U.S., at 549-550, 87 S.Ct., at 646-47; Hernandez v. Texas, 347 U.S., at 482, 74 S.Ct., at 672-673; Patton v. Mississippi, 332 U.S., at 469, 68 S.Ct., at 187. (Footnote omitted)

STATEMENT OF THE CASE

This Court has jurisdiction to review the judgments below on a writ of certiorari.

On September 29, 1992, the trial court denied Petitioner's motion to dismiss the array after the trial court conducted a Batson evidentiary hearing (Pet.App. 33-77), after Petitioner made a prima facie showing of the prosecutors' peremptorily striking many Hispanics (Pet.App. 8, 37-43, 47).

On October 7, 1994, the jury found Petitioner Carlos Salinas guilty on count 1 of murder and on count 3 of attempted murder in cause number CR-1044-90-A. The jury assessed

punishment at confinement in prison for forty-five years and twenty-five years respectively.

On October 13, 1994, the 13th Texas Court of Appeals affirmed the judgments of conviction and reversed the judgments as to the punishment and remanded the causes to the trial court (Pet.App. 1-28).

During appeal to the Texas Court of Appeals, Petitioner raised seven points of error. Only those contending racially biased jury selection are relevant here. In his points of error nos. 5A1, 5A2, 6A1 and 6A2, Petitioner complained the trial court reversibly erred (a) in not presuming race under the Batson case and the U.S. Constitution's Fourteenth Amendment's equal protection clause, as the basis of the State's strike on prospective jurors Eligio Flores and Daniel Torres, Jr., as to whom the State gave no explanation for its peremptory strikes and/or (b) in denying Petitioner's motion to dismiss the array and to call a new array under Article 35.261, Texas Code of

Criminal Procedure, for the State's racial excluding from the jury prospective jurors Eligio Flores and Daniel Torres, Jr., as to each of whom the State gave no explanation for its peremptory strike.

Rejecting Petitioner's contentions and reliance on Batson, the Texas Court of Appeals held that the prosecution's failure to provide explanations as to two venire-members did not amount to error. The Texas Court of Appeals said (footnote omitted) (Pet.App. 15-16):

> Our holding here is simply that despite the State's failure to explain its removal of veniremembers Flores and Torres, the trial court's conclusion that the State's use of its strikes was not race-based is supportable by other circumstances, i.e., the overwhelming number of Hispanics on the venire and the petit jury. In addition, the prosecutors gave race-neutral explanations for the strikes which appellant questioned.
>
> We recognize that the prosecutors did not comply with Wright's procedural requirements. In most cases such failure would constitute reversible error. Our holding is peculiar to the facts of this case. While it would have been better practice for the State to have explained all of its strikes, we find no reversible error in this case. Appellant's fifth and sixth points of error are overruled.

ARGUMENT

The trial court and the Texas Court of Appeals both reversibly erred in holding that the State had no burden herein to rebut Petitioner's prima facie Batson showing of discrimination in the State's unexplained use of two peremptory strikes.

Under Batson v. Kentucky, 476 U.S. 98 (1986), once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation for the strike. If no explanation is offered by the State, the defendant's conviction must be reversed. Id., 476 U.S. at 100. However, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. Hernandez v. New York, 500 U.S. 352, 358-359 (1991) (plurality opinion) id., at 375 (O'Connor, J., concurring in judgment).

The "burden of proof" within the Batson doctrine is three-fold in that it is a

shifting burden. Initially, the burden of proof lies with the opponent of the peremptory strike. Batson, supra, 476 U.S. at 98. In all cases alleging racial discrimination the complainant must first establish a prima facie case of racial discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253, 101 S. Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981) [plaintiff's establishment of prima facie discrimination raises a presumption of unlawful discrimination].

"A presumption is not evidence in itself, however, a presumption operates to relieve the party in whose favor it works from going forward in argument or evidence. It also serves therefore the purposes of a prima facie case." Delo v. Lashley, 113 S.Ct. 1222, 1228 (1993). "All other presumptions are rebuttable by contravening evidence. However, unless and until contravening evidence is presented, a presumption gives rise to a mandatory deduction, i.e. the presumed fact must be assumed from

proof of the basic fact." (Footnote omitted) Charles E. Torcia, Wharton's Criminal Evidence, page 29 (1985); Texas Rules of Evidence Manual, Article III, (1991).

This presumption is rebuttable as the "burden of production" then shifts to the defendant to come forward with an explanation. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) [defendant may rebut this presumption by introducing evidence of legitimate and nondiscriminatory reasons for their actions]; Director, OWCP v. Greenwich Colleries, 114 S.Ct. 2251, 2259 (1994) [once the licensee establishes a prima facie case, the burden shifts to the government to rebut it]. "This rule of shifting persuasion is compatible with a rule placing the burden of persuasion on the applicant, because when the party with the burden of persuasion establishes a prima facie case supported by credible and credited evidence, it must either be rebutted or accepted as true." Id., 114 S.Ct. at 2259.

Silence, or the refusal or failure to offer a rebuttal did not amount either to raising an issue or to carrying the burden of production against a prima facie case.

Petitioner's convictions should be overturned because the State failed to sustain its burden of production, and therefore failed to rebut Petitioner's prima facie case of discrimination in jury selection. Batson, 476 U.S. at 100, 106 S.Ct. at 1725 ["If ... the prosecutor does not come forward with a neutral explanation for his action, our precedents require petitioner's conviction be reversed"].

The Texas Court of Appeals attempted to sidestep the State prosecutors' failure to offer an explanation with the fact that the first eighteen eligible panel members were Hispanic, and that twenty-four of the first twenty-five eligible members were also Hispanic (Pet.App. 14-16). Salinas v. State, supra, 888 S.W.2d at 99 (Tex.App.—Corpus Christi 1994) [the overwhelming number of Hispanics on the venire

and the petit jury]. In spite of Batson, the Texas Court of Appeals also emphasized the fact that the State's attorneys and the trial judge who ruled on the complaint were Hispanic (Pet.App. 14). Salinas, supra, 888 S.W.2d at 98.

The Texas Court of Appeals was unduly influenced by the ethnicity of the community in which the trial court was located. Both courts below disregarded the controlling law in this case: Batson requires the proponent of the strike to come forward with an explanation to rebut the opponent's prima facie showing of discriminatory intent.

The Texas Court of Appeals, in effect, overruled Batson by finding no error allowing the State to refuse to offer any evidence for striking veniremen Torres and Flores. In failing to sustain its burden of production, the State conceded or accepted Petitioner's prima facie showing of discriminatory intent.

Not only did the Texas Court of Appeals err in misapplying Batson and its progeny, that Court of Appeals also erred in finding no federal Constitutional equal protection violation.

In Batson challenges as in all equal protection claims, the defendant must show that the prosecutor deliberately used the State's peremptory challenges for the purpose of excluding a minority person from the jury. Hernandez v. New York, 500 U.S. ___, 111 S.Ct. 1859, 1886, 114 L.Ed.2d 395 (1991).

The goal of Batson was not only to guard the equal protection rights of individual defendants from racial discrimination in the selection of jurors, but also to secure the rights of the prospective jurors and the community at large from racial discrimination in the selection of juries. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 1370-1374, 113 L.Ed.2d 411 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990).

A criminal defendant may object to the State's racially discriminatory exclusions of prospective jurors through the exercise of peremptory challenges whether or not the defendant and the excluded venireperson share the same race. Powers, 499 U.S. at ___, 111 S.Ct. at 1373; Mead v. State, 819 S.W.2d 869 (Tex.Cr.App. 1991). "Batson represents a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." Brown v. North Carolina, 479 U.S. 940, 941-942, 107 S.Ct. 423, 424, 93 L.Ed.2d 373 (1986) [O'Connor, J., concurring in opinion denying certiorari.]. Batson is a commitment by the courts to eradicate any vestige of racial discrimination in the administration of justice. Id.

Additionally, the Texas Court of Appeals erred in weighing federal Constitutional rights. Contrary to the ruling in Alvarado v. U.S., 497 U.S. 543, 110 S.Ct. 2995, 111 L.Ed.2d 439 (1990), the Texas Court of Appeals in effect

held that since for Petitioner the Sixth Amendment's requirement of a fair cross section had been met, there was no need to consider under the Fourteenth Amendment's equal protection clause, Petitioner's claim that the State had not met its burden of persuasion as required in Batson v. Kentucky, 476 U.S. 79 (1986).

Petitioner showed himself to be a member of an identifiable racial or ethnic group. "... Mexican-Americans are a clearly identifiable class." Castañeda v. Partida, 430 U.S. 482, 496, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) [state did not rebut criminal defendant's prima facie case showing discrimination against Mexican-Americans in the grand jury selection in Hidalgo County, Texas, so there was a fatal denial of equal protection of the law in the grand jury selection process in Partida's case].

Hidalgo County, Texas, is the situs for the above Partida case as well as the county where Petitioner Salinas was jury tried after

unsuccessfully asserting each Hispanic and Anglo venireperson's right to the equal opportunity to serve on a jury free from being peremptorily struck by the State's racially based discriminatory motives. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Georgia v. McCollum, 505 U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

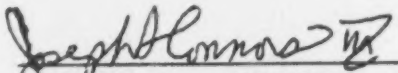
Petitioner's prima facie showing of the State's discrimination shifted the burden of persuasion onto the State to prove that the prosecutors did not strike based upon race. Batson, id., 476 U.S. at 1723-25. The State failed to explain its motivation for striking veniremen Eligio Flores and Daniel Torres, Jr. Therefore, both Petitioner's convictions should be overturned based on his Constitutional "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson, id., 476 U.S. at 85-85, 106 S.Ct. at 1717.

CONCLUSION

For all of the forgoing reasons, Petitioner respectfully urges this Court to grant this writ of certiorari, and remand these cases to the Texas Court of Appeals with instructions to reverse Petitioner's judgments of conviction as Constitutionally invalid.

DATED: June 20, 1995.

Respectfully submitted by,
Petitioner's Attorney,



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